

ESTTA Tracking number: **ESTTA1040892**

Filing date: **03/09/2020**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91233690
Party	Plaintiff Image Ten, Inc.
Correspondence Address	CECILIA DICKSON THE WEBB LAW FIRM PC 420 FT DUQUESNE BLVD SUITE 1200 PITTSBURGH, PA 15222 UNITED STATES cdickson@webblaw.com, csherwin@webblaw.com, trademarks@webblaw.com, gvadala@webblaw.com 412-471-8815
Submission	Testimony For Plaintiff
Filer's Name	Cecilia R. Dickson
Filer's email	cdickson@webblaw.com, csherwin@webblaw.com, trademarks@webblaw.com, gvadala@webblaw.com
Signature	/Cecilia R. Dickson/
Date	03/09/2020
Attachments	Affidavit of Jim Cirronella.pdf(228559 bytes) Exhibit A.pdf(50877 bytes) Exhibit B.pdf(1754400 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IMAGE TEN, INC.,)	Opposition No.: 91233690
)	
Opposer,)	Application No.: 87/090,468
)	
v.)	Mark: NIGHT OF THE LIVING DEAD
)	
RUSTY RALPH LEMORANDE,)	Filed: June 30, 2016
)	
Applicant.)	
)	

AFFIDAVIT OF MR. JAMES N. CIRRONELLA JR.

I, Mr. James N. Cirronella Jr., of legal age, a citizen of the State of New Jersey, United States, with an office address at 60 Genesee Avenue, Teaneck, NJ, United States of America, after having been duly sworn to in accordance with the law, and subject to the right of the Applicant, Mr. Rusty Lemorande to take and bear the expense of cross-examination pursuant to 37 C.F.R. § 2.123(a)(1), depose and say that:

1. I am a director of Opposer, Image Ten, Inc., a corporation organized under and governed by the laws of the Commonwealth of Pennsylvania, having an address at 361 Prospect Road, Evans City, Pennsylvania (hereinafter referred to collectively as “Image Ten”).

2. I have been a director of Image Ten for more than 1-1/2 years, beginning in July of 2018, and have served in my current position since October of 2018. I am very familiar with Image Ten’s operations, products, services, contracts, and intellectual property portfolio, including trademarks, copyrights, and other intellectual property. I have access to and am familiar with Image Ten’s matters in relation to the sales, advertising, and promotion of its products and services in the United States and throughout the world.

3. I am authorized to prepare this Affidavit on behalf of Image Ten. I am executing this Affidavit based on information, documents, and records available to me in my position and produced in this opposition proceeding, as well as my own personal knowledge.

4. Image Ten has, since at least 1968, cultivated one of popular culture's most recognizable movie properties, *Night of the Living Dead*. From its creation of the modern zombie movie genre, to producing motion pictures, to developing, marketing, and selling related merchandise, to hosting conventions and performing other services, Image Ten continues to create and foster new entertainment-related experiences dedicated to one of the world's most popular horror movies. Through the contributions of Mr. George Romero, Mr. Russ Streiner, Mr. Gary Streiner, and others, the NIGHT OF THE LIVING DEAD mark has gained worldwide recognition. Due to this worldwide recognition, and although the general public may not recognize the name "Image Ten", Image Ten is often colloquially referred to as or understood to be "the Night of the Living Dead company", and Image Ten has utilized the NIGHT OF THE LIVING DEAD mark, which was derived from the title of the 1968 movie, in all of its ongoing endeavors relating to various products and services.

5. The products and services offered by Image Ten have been and continue to be marketed under NIGHT OF THE LIVING DEAD™. This trademark has been in use since at least as early as 1968 for a variety of different goods and services, including, without limitation, film conventions, film production, clothing, publications, toys, and memorabilia, among other items, and in any event, certainly before Mr. Lemorande filed his application to register NIGHT OF THE LIVING DEAD. Thus, while we are proud of our long-standing heritage and use of NIGHT OF THE LIVING DEAD for more than 50 years, for purposes of this opposition, we can

attest that we have used this trademark consistently before Mr. Lemorande filed his pending application.

6. Image Ten is the owner of U.S. Federal Trademark Registration No. 3,686,876 (NIGHT OF THE LIVING DEAD), and U.S. Federal Trademark Application No. 87/317,966 (NIGHT OF THE LIVING DEAD). In addition to the rights identified in this registration and pending application, Image Ten has long-standing common law rights in NIGHT OF THE LIVING DEAD™. True and correct copies of each of the electronic database records of the United States Patent and Trademark Registration and Application listed above showing the current status and title of each of these registration and application are attached hereto as Exhibit A. This registration is currently in effect, and, to my knowledge, this registration lists the correct dates of first use and first use in commerce of the respective mark in association with the enumerated goods. The pending application likewise lists goods and services for which Image Ten would like to formalize its common law rights.

7. Image Ten has expended considerable time, money, and effort in the development, preparation, advertisement, promotion, and sale of goods and services under the NIGHT OF THE LIVING DEAD mark throughout the United States, including, but not limited to, motion picture production services. Image Ten has produced documentaries concerning the Making of *The Night of The Living Dead* in or about 2007 and 2017. Image Ten directors and shareholders, and Night of the Living Dead cast and crew members, participated in the documentaries concerning the making of Night of The Living Dead that were produced by the Criterion Collection for publication in February 2018.

8. Image Ten, since at least as early as 2014, has diligently worked to advertise, collaborate and ultimately license its film clips under the NIGHT OF THE LIVING

DEAD mark to third parties producing their own motion picture and television programs. Image Ten has advertised and marketed, under the NIGHT OF THE LIVING DEAD mark, licenses for the use of film clips from the 1968 *Night of the Living Dead* film. Image Ten has attended numerous conventions and licensing expos to offer third party film production companies copies of its film clips in new motion pictures. Evidence depicting an example of Image Ten's advertising efforts at these conventions and expos is attached as Exhibit B.

9. Image Ten has also produced a remastered edition of the 1968 *Night of the Living Dead* film. At least as early as June 2016, Image Ten partnered with the Museum of Modern Art and negotiated an agreement such that they would assist in remastering the 1968 *Night of the Living Dead* film to restore the original film and amend and introduce improved video and new audio. An agreement was finalized and signed with the Museum of Modern Art on October 14, 2016. After several months of restoration and collaboration, the official remastered version of the *Night of the Living Dead* film was published on November 5, 2016. Upon publication, Image Ten hosted several theatrical screenings of the film, including Q&A sessions to discuss the original filmmaking process and the restoration process.

10. Image Ten has used its NIGHT OF THE LIVING DEAD mark in and has received revenue from its continuing activities relating to the 1968 *Night of the Living Dead* movie, including, without limitation, grants and licenses for use of film clips for motion picture production, arranging appearances of movie talent, organizing and arranging festivals, gatherings and showings, and licensing, manufacturing and selling products and merchandise relating to the 1968 *Night of the Living Dead* movie, including, without limitation, figurines, t-shirts, pins, clothing and the like. Many, if not all, of these products and merchandise are incidental to the

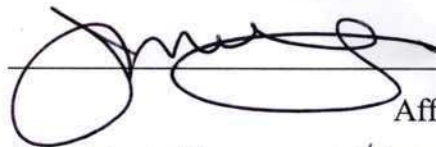
production of a motion picture. These products and merchandise are typically developed and sold in conjunction with the production and release of a motion picture.

11. Allowing the registration of any mark which is the same or similar to the NIGHT OF THE LIVING DEAD mark and/or which contains a predominate element of the NIGHT OF THE LIVING DEAD mark by any other entity in association with movie production services will certainly cause irreparable damage, confusion to the public, and dilute and erode the distinctiveness and goodwill that Image Ten's mark has already obtained through continuous use, extensive advertisement and industry promotions. Any failure by Image Ten to protect the NIGHT OF THE LIVING DEAD mark could diminish the value and effectiveness of its past and future marketing efforts and will cause customer confusion.

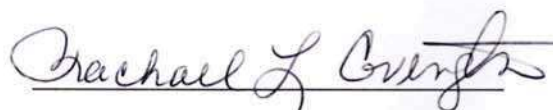
12. Moreover, allowing registration of Applicant's NIGHT OF THE LIVING DEAD mark would allow Applicant to obtain an undue benefit by riding on the popularity, fame, and reputation that Image Ten enjoys, and that was built by Image Ten over the years through continued advertising, convention attendance, fan interactions, and enforcement of quality control standards for merchandising and services.

13. This Affidavit is a complete representation of the facts to which I am swearing.

I hereby affix my signature this 6th day of March, 2020 at Bergen County, N.J.


Affiant

SUBSCRIBED and sworn to before me, a Notary Public, this 6th day of March, 2020
at Bergen County N.J.


Notary Public

RACHAEL L. COVINGTON
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 9/6/2023 5

EXHIBIT A

Generated on: This page was generated by TSDR on 2020-03-09 14:16:37 EDT

Mark: NIGHT OF THE LIVING DEAD

Night of The Living Dead

US Serial Number: 77399334

Application Filing Date: Feb. 18, 2008

US Registration Number: 3686876

Registration Date: Sep. 22, 2009

Register: Principal

Mark Type: Trademark

TM5 Common Status Descriptor:



LIVE/REGISTRATION/Issued and Active

The trademark application has been registered with the Office.

Status: A Section 8 declaration has been accepted.

Status Date: Aug. 06, 2015

Publication Date: Jul. 08, 2008

Notice of Allowance Date: Sep. 30, 2008

Mark Information

Mark Literal Elements: NIGHT OF THE LIVING DEAD

Standard Character Claim: Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type: 4 - STANDARD CHARACTER MARK

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis ((.)) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: T-shirts

International Class(es): 025 - Primary Class

U.S Class(es): 022, 039

Class Status: ACTIVE

Basis: 1(a)

First Use: Oct. 31, 2008

Use in Commerce: Oct. 31, 2008

For: Action figures and accessories therefor

International Class(es): 028 - Primary Class

U.S Class(es): 022, 023, 038, 050

Class Status: ACTIVE

Basis: 1(a)

First Use: Oct. 31, 2008

Use in Commerce: Oct. 31, 2008

Basis Information (Case Level)

Filed Use: No

Currently Use: Yes

Filed ITU: Yes

Currently ITU: No

Filed 44D: No

Currently 44E: No

Filed 44E: No

Currently 66A: No

Filed 66A: No

Currently No Basis: No

Filed No Basis: No

Current Owner(s) Information

Owner Name: IMAGE TEN, INC.

Owner Address: 216 EUCLID AVENUE
GLASSPORT, PENNSYLVANIA UNITED STATES 15045

Legal Entity Type: CORPORATION

State or Country PENNSYLVANIA
Where Organized:

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Paul Barlow

Attorney Primary Email Address: paulbarlowesq@aol.com

Attorney Email Authorized: No

Correspondent

Correspondent Name/Address: SphereWerx, LLC
56-03 203rd Street
Oakland Gardens, NY, NEW YORK UNITED STATES 11364

Phone: 718.810.6501

Fax: 631.465.9133

Correspondent e-mail: joe@fourthcastle.com

Correspondent e-mail Authorized: Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Sep. 22, 2018	COURTESY REMINDER - SEC. 8 (10-YR)/SEC. 9 E-MAILED	
May 17, 2017	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Aug. 06, 2015	NOTICE OF ACCEPTANCE OF SEC. 8 - E-MAILED	
Aug. 06, 2015	REGISTERED - SEC. 8 (6-YR) ACCEPTED	68335
Aug. 06, 2015	CASE ASSIGNED TO POST REGISTRATION PARALEGAL	68335
Jul. 05, 2015	TEAS SECTION 8 RECEIVED	
Jul. 05, 2015	TEAS CHANGE OF CORRESPONDENCE RECEIVED	
Sep. 22, 2009	REGISTERED-PRINCIPAL REGISTER	
Aug. 20, 2009	LAW OFFICE REGISTRATION REVIEW COMPLETED	66213
Aug. 19, 2009	ALLOWED PRINCIPAL REGISTER - SOU ACCEPTED	
Jul. 20, 2009	TEAS/EMAIL CORRESPONDENCE ENTERED	66213
Jul. 20, 2009	CORRESPONDENCE RECEIVED IN LAW OFFICE	66213
Jul. 17, 2009	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Jan. 23, 2009	NOTIFICATION OF NON-FINAL ACTION E-MAILED	
Jan. 23, 2009	NON-FINAL ACTION E-MAILED	
Jan. 23, 2009	SU - NON-FINAL ACTION - WRITTEN	77764
Jan. 08, 2009	STATEMENT OF USE PROCESSING COMPLETE	76569
Dec. 18, 2008	USE AMENDMENT FILED	76569
Jan. 08, 2009	CASE ASSIGNED TO INTENT TO USE PARALEGAL	76569
Dec. 18, 2008	TEAS STATEMENT OF USE RECEIVED	
Sep. 30, 2008	NOA MAILED - SOU REQUIRED FROM APPLICANT	
Jul. 08, 2008	PUBLISHED FOR OPPOSITION	
Jun. 18, 2008	NOTICE OF PUBLICATION	
May 31, 2008	LAW OFFICE PUBLICATION REVIEW COMPLETED	66213
May 31, 2008	ASSIGNED TO LIE	66213
May 30, 2008	APPROVED FOR PUB - PRINCIPAL REGISTER	
May 29, 2008	ASSIGNED TO EXAMINER	77764

TM Staff and Location Information

TM Staff Information - None

File Location

Current Location: TMO LAW OFFICE 117

Date in Location: Aug. 06, 2015

Assignment Abstract Of Title Information

Summary

Total Assignments: 1

Registrant: SphereWerx, LLC

Assignment 1 of 1

Conveyance: ASSIGNS THE ENTIRE INTEREST

Reel/Frame: [6052/0078](#)

Pages: 2

Date Recorded: May 03, 2017

Supporting Documents: [assignment-tm-6052-0078.pdf](#)

Assignor

Name: [SPHEREWERX, LLC](#)

Execution Date: May 03, 2017

Legal Entity Type: LIMITED LIABILITY COMPANY

State or Country Where Organized: NEW YORK

Assignee

Name: [IMAGE TEN, INC.](#)

Legal Entity Type: CORPORATION

State or Country Where Organized: PENNSYLVANIA

Address: 216 EUCLID AVENUE
GLASSPORT, PENNSYLVANIA 15045

Correspondent

Correspondent Name: FARAH P. BHATTI

Correspondent Address: 18400 VON KARMAN AVE., SUITE 800
IRVINE, CA 92612

Domestic Representative - Not Found

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Mark: NIGHT OF THE LIVING DEAD

NIGHT OF THE LIVING DEAD

US Serial Number: 87317966

Application Filing Date: Jan. 30, 2017

Filed as TEAS RF: Yes

Currently TEAS RF: Yes

Register: Principal

Mark Type: Trademark, Service Mark

TM5 Common Status Descriptor:



LIVE/APPLICATION/Under Examination

The trademark application has been accepted by the Office (has met the minimum filing requirements) and that this application has been assigned to an examiner.

Status: Suspension check completed. Application remains suspended.

Status Date: Oct. 24, 2019

Mark Information

Mark Literal Elements: NIGHT OF THE LIVING DEAD

Standard Character Claim: Yes. The mark consists of standard characters without claim to any particular font style, size, or color.

Mark Drawing Type: 4 - STANDARD CHARACTER MARK

Goods and Services

Note:

The following symbols indicate that the registrant/owner has amended the goods/services:

- Brackets [...] indicate deleted goods/services;
- Double parenthesis (()) identify any goods/services not claimed in a Section 15 affidavit of incontestability; and
- Asterisks *..* identify additional (new) wording in the goods/services.

For: Action figures and accessories therefor; collectibles; figurines made of porcelain; glass, plastic, or earthenware; statues; lunch boxes; model kits; toys; play sets; trading cards; puzzles; board games; dolls; masks; costumes; toy weapons; toy guns; make-up kits; face paint kits; fake blood; prosthetics; t-shirts; short-sleeve shirts; long-sleeve shirts; hooded sweatshirts; sweatshirts; sweatpants; hats; tossle caps; ponchos; jackets; sunglasses; eye glasses; dresses; shoes; coats; gloves; scarves; leggings; jeans; underwear; lingerie; socks; belts; boots; keychains; magnets; necklaces; earrings; bracelets; pins; lanyards; cufflinks; tie-pins; watches; umbrellas; aprons; paintings; posters; books; coloring and activity books; comic books; graphic novels; magazines; newsletters; bumper stickers; bumper decals; paper pennants; greeting cards; pictorial prints; postcards; stationary; photo albums; scrapbook albums; wrapping paper; playing cards; paper napkins; paper party hats; paper party invitations; paper gift bags; paper decorations; non-downloadable publications; downloadable publications; motion picture screenplays; stage play scripts; story adaptation publications; still photos; framed pictures; banners; flags; bed sheets; comforters; pillow cases; blankets; rugs; pillows; sleeping bags; lamps; stickers; decals; patches; fabric flags and pennants; balloons; plush toys; stuffed animals; golf bags; golf club covers; bowling bags; Christmas tree ornaments; windsocks; kites; backpacks; satchel bags; messenger bags; purses; hand bags; wallets; pencils; pens; folders; binders; notebooks; writing pads; journals; calendars; day planners; cell phone cases; coin operated video games; arcade type electronic games; pinball machines; computer game software for gaming machines, namely, slot machines and video lottery terminals; computer game software for use on mobile and cellular phones; computer game programs; computer game software for personal computers and home video game consoles; contact lenses; video and computer game programs; computer game software for use with personal computers; home video game consoles used with televisions and arcade-based video game consoles; digital media, namely, streamed movies and television shows; DVDs featuring movies or television shows; Blu-ray disks featuring movies or television shows; computer or cell phone applications including movies, television shows, video games, and trivia; drinking glasses; pitchers for beer; plates; dinnerware; water bottles; coffee mugs; candy; breakfast cereals; chewing gum; snacks; drinks; lighters for smokers; ashtrays

International Class(es): 028 - Primary Class

U.S Class(es): 022, 023, 038, 050

Class Status: ACTIVE

Basis: 1(b)

For: Entertainment services, namely, development, creation, production, distribution, and post-production of movies, television shows, web series, podcasts, and documentaries; theatrical film presentation services; organizing, arranging, and hosting film conventions, toy conventions, festivals, competitions, races, and pop culture conventions; move and television show video-on-demand services; toys,

collectibles, and memorabilia development and production services; marketing services for all types of merchandise for others

International Class(es): 041 - Primary Class

U.S Class(es): 100, 101, 107

Class Status: ACTIVE

Basis: 1(b)

Basis Information (Case Level)

Filed Use: No

Currently Use: No

Filed ITU: Yes

Currently ITU: Yes

Filed 44D: No

Currently 44E: No

Filed 44E: No

Currently 66A: No

Filed 66A: No

Currently No Basis: No

Filed No Basis: No

Current Owner(s) Information

Owner Name: IMAGE TEN, INC.

Owner Address: 216 EUCLID AVENUE
GLASSPORT, PENNSYLVANIA UNITED STATES 15045

Legal Entity Type: CORPORATION

State or Country PENNSYLVANIA
Where Organized:

Attorney/Correspondence Information

Attorney of Record

Attorney Name: Cecilia R. Dickson

Docket Number: 8159-1700590

Attorney Primary Email Address: trademarks@webblaw.com

Attorney Email Authorized: Yes

Correspondent

Correspondent Name/Address: Cecilia R. Dickson
The Webb Law Firm
420 Fort Duquesne Boulevard, Suite 1200
One Gateway Center
Pittsburgh, PENNSYLVANIA UNITED STATES 15222

Phone: 412-471-8815

Fax: 412-471-4094

Correspondent e-mail: trademarks@webblaw.com

Correspondent e-mail Authorized: Yes

Domestic Representative - Not Found

Prosecution History

Date	Description	Proceeding Number
Oct. 24, 2019	REPORT COMPLETED SUSPENSION CHECK CASE STILL SUSPENDED	
Oct. 16, 2019	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Oct. 16, 2019	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	
Apr. 24, 2019	REPORT COMPLETED SUSPENSION CHECK CASE STILL SUSPENDED	
Oct. 24, 2018	REPORT COMPLETED SUSPENSION CHECK CASE STILL SUSPENDED	
Apr. 24, 2018	REPORT COMPLETED SUSPENSION CHECK CASE STILL SUSPENDED	
Oct. 23, 2017	NOTIFICATION OF LETTER OF SUSPENSION E-MAILED	6332
Oct. 23, 2017	LETTER OF SUSPENSION E-MAILED	6332
Oct. 23, 2017	SUSPENSION LETTER WRITTEN	90291
Oct. 20, 2017	TEAS/EMAIL CORRESPONDENCE ENTERED	88889
Oct. 19, 2017	CORRESPONDENCE RECEIVED IN LAW OFFICE	88889
Oct. 19, 2017	TEAS RESPONSE TO OFFICE ACTION RECEIVED	
Jul. 28, 2017	ATTORNEY/DOM.REP.REVOKED AND/OR APPOINTED	
Jul. 28, 2017	TEAS REVOKE/APP/CHANGE ADDR OF ATTY/DOM REP RECEIVED	

May 10, 2017	AUTOMATIC UPDATE OF ASSIGNMENT OF OWNERSHIP	
Apr. 27, 2017	NOTIFICATION OF NON-FINAL ACTION E-MAILED	6325
Apr. 27, 2017	NON-FINAL ACTION E-MAILED	6325
Apr. 27, 2017	NON-FINAL ACTION WRITTEN	90291
Apr. 25, 2017	ASSIGNED TO EXAMINER	90291
Feb. 02, 2017	NEW APPLICATION OFFICE SUPPLIED DATA ENTERED IN TRAM	
Feb. 02, 2017	NEW APPLICATION ENTERED IN TRAM	

TM Staff and Location Information

TM Staff Information

TM Attorney: BAL, KAMAL SINGH

Law Office Assigned: LAW OFFICE 119

File Location

Current Location: TMO LAW OFFICE 119 - EXAMINING ATTORNEY ASSIGNED

Date in Location: Mar. 02, 2020

Assignment Abstract Of Title Information

Summary

Total Assignments: 1

Applicant: Night of the Living Dead LLC

Assignment 1 of 1

Conveyance: ASSIGNS THE ENTIRE INTEREST

Reel/Frame: [6046/0139](#)

Pages: 2

Date Recorded: May 01, 2017

Supporting Documents: [assignment-tm-6046-0139.pdf](#)

Assignor

Name: [NIGHT OF THE LIVING DEAD LLC](#)

Execution Date: Apr. 27, 2017

Legal Entity Type: LIMITED LIABILITY COMPANY

State or Country Where Organized: PENNSYLVANIA

Assignee

Name: [IMAGE TEN, INC.](#)

Legal Entity Type: CORPORATION

State or Country Where Organized: PENNSYLVANIA

Address: 216 EUCLID AVENUE
GLASSPORT, PENNSYLVANIA 15045

Correspondent

Correspondent Name: FARAH P. BHATTI

Correspondent Address: 18400 VON KARMAN AVE., SUITE 800
IRVINE, CA 92612

Domestic Representative - Not Found

EXHIBIT B

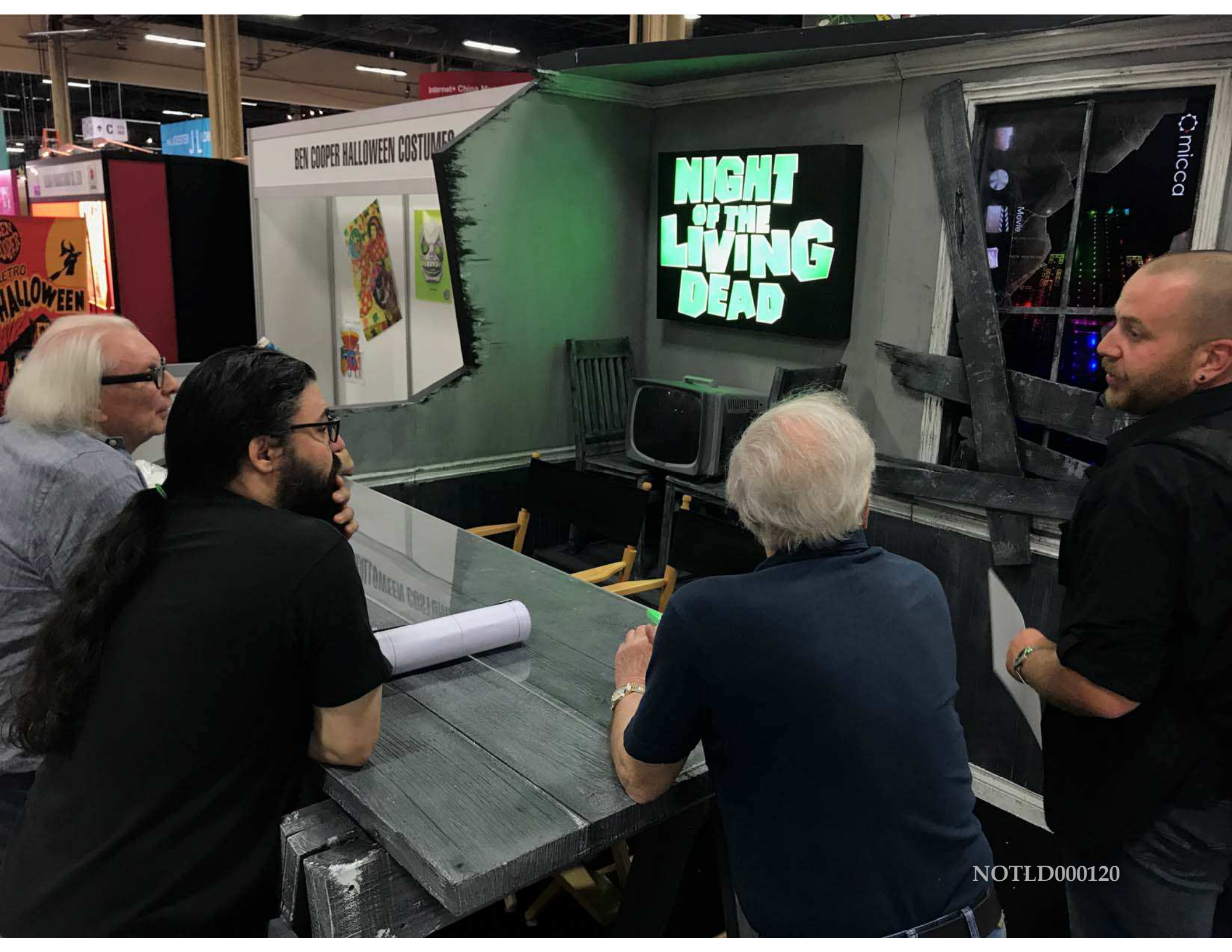
PER HALLOWEEN COSTUMES



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micca

NOTLD000120

NIGHT OF THE LIVING DEAD



NOTLD000121

LICENSING EXPO 2017 PART OF LICENSING WEEK MAY 22-25



RAMONA
STREINER
IMAGE TEN
LOS ANGELES, CA
EXHIBITOR

NOTLD000122



NOTLD000123